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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LAURENCE L. GRABOWSKI,

Plaintiff, Cross-defendant, and Respondent,

v.

PINE TREE INDUSTRIAL CORPORATION,

Defendant and Appellant;

LA PAZ PETROLEUM, INC.,

Defendant, Cross-complainant, and Appellant.

G040849

(Super. Ct. No. 00CC14365)

O P I N I O N

Appeal from judgments of the Superior Court of Orange County, H. Warren Siegel, Judge. Reversed and remanded with directions.

Jeffer, Mangels, Butler & Marmaro, Stanley M. Gibson and Paul A. Kroeger for Defendant and Appellant Pine Tree Industrial Corporation and Defendant, Cross-complainant, and Appellant La Paz Petroleum, Inc.

Larry R. Marshall for Plaintiff, Cross-defendant, and Respondent.

This appeal is the latest installment in the Grabowski family dispute that has been in litigation since 1996. For convenience, we will refer to the individual litigants by their first names. They include: Patrick Grabowski (Patrick), his wife Janis Grabowski (Janis), their four now adult children, and Patrick's younger brother, Laurence L. Grabowski (Larry). Larry is the respondent in this appeal. Corporate litigants include Pine Tree Industrial Corporation (Pine Tree), a corporation owned by Patrick, Janis, and Larry, and La Paz Petroleum, Inc. (La Paz), a corporation owned by Patrick and Janis's four children. Pine Tree and La Paz are the appellants. Larry sued Patrick, Patrick's family, Pine Tree, and La Paz seeking dissolution and accounting of his and Patrick's 40-year business relationship. Patrick, Janis, and La Paz filed cross-complaints against Larry. Following a bench trial, the court entered judgments as to Pine Tree and La Paz. As to Patrick and his family, the court entered an interim judgment for an accounting by Patrick, which has yet to be completed. Pine Tree and La Paz appeal from the judgments concerning them, contending the court erred by denying a motion under Code of Civil Procedure section 664.6[1] to enforce a global settlement of the dispute reached during trial. We conclude the court erred by refusing to hear and rule on the motion. Accordingly, we reverse the judgments and remand for further proceedings.

FACTS AND PROCEDURE

Our prior nonpublished opinion *Laurence L. Grabowski v. Mustang Motels, Inc.* (Sept. 18, 2007, G036783) explains: "Larry and Patrick started buying properties together in the early 1960s when they were teenagers, and they operated many properties and businesses (primarily motels) as joint ventures or partnerships. Patrick, the older brother, handled the business side of their investments. Throughout the years, profits from the various businesses and properties were deposited into a bank account, called in

[1] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

this litigation the 'Miscellaneous Account,' managed exclusively by Patrick. The personal expenses of both brothers' families were paid by Patrick from the Miscellaneous Account. . . . The record does not disclose why the brothers' relationship soured, but eventually Larry demanded an accounting of the properties, businesses, corporations, and bank accounts, and this litigation ensued."

Larry's Complaint

The litigation was commenced by Larry in 1996; his operative complaint is the second amended complaint filed in May 1997. Larry's complaint (hereafter, the complaint), contained 14 causes of action against Patrick, Janis, their children, and various business entities including Pine Tree. The causes of action were largely for accountings as to business entities, dissolution of joint ventures between the brothers as to those entities, and specific performance of joint venture agreements. In his first cause of action, Larry sought dissolution of Pine Tree, which owned and operated a motel called the "Snooty Fox." Larry alleged he owned 50 percent of Pine Tree's stock. The complaint's second cause of action was for an accounting of Pine Tree. We need not detail the other causes of action.[2] Patrick and Janis apparently filed a cross-complaint against Larry for an accounting, but that pleading is not in the record.

In 1997, Larry amended his complaint to add La Paz as a Doe defendant in most of his causes of action, but he added no substantive allegations as to La Paz. In 1998, La Paz successfully moved for summary judgment in its favor on Larry's complaint.

La Paz's Cross-Complaint

In November 1997, La Paz filed a cross-complaint against Larry and Patrick. The cross-complaint alleged Larry and Patrick were in a joint venture operating

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[2] In our prior opinion we affirmed a judgment finding Larry had no interest in another of Patrick's family corporations, Mustang Motels, Inc. (*Laurence L. Grabowski v. Mustang Motels, Inc., supra,* G036783.)

a Comfort Inn motel owned by La Paz. The oral management agreement required they make monthly payments of $25,000 to La Paz. The cross-complaint alleged Patrick and Larry were deficient in payments. La Paz's cross-complaint contained a cause of action for an accounting of the joint venture to determine the deficiency, declaratory relief, and a common count.

Trial/Global Settlement Agreement

In 2003, the parties stipulated to have the ownership issues regarding Pine Tree heard by retired Judge Philip E. Schwab. As to Pine Tree, Judge Schwab found Larry was owner of only 37.5 percent of the shares of Pine Tree (not the 50 percent he claimed), and he was not entitled to a dissolution of the corporation. But apparently the ruling was never finalized, and the matter eventually proceeded to trial.

The remaining causes of action in Larry's complaint against all defendants, on La Paz's cross-complaint, and on Patrick and Janis's cross-complaint came on for a bench trial in 2007. At the beginning of trial, counsel advised the court La Paz's cross-complaint against Patrick had "been resolved" and La Paz was only proceeding against Larry on its common count for money due.

After several days of trial, both sides rested on October 22, 2007, and the court set a schedule for hearing final motions and closing argument. The next morning, October 23, counsel for both sides advised the court a global settlement had been reached. It was Larry's counsel who recited the settlement terms on the record before the court as follows:

"[Larry's counsel]: The first term is the amount of $2.4 million will be paid to [Larry] . . . at the rate of $10,000 per month or more starting February 1st or such later date as [Larry] designates in 2008. [¶] The amount will be fully secured. The parties will cooperate in having all payments and transfers characterized as long-term capital gains. [¶] With respect to the payments on the $2.4 million, the parties are in agreement that there will be no interest component in the $10,000 payments. The parties

will also cooperate in allocating the payments to depreciation provided there's no adverse impact on long-term capital gains aspect of it. [¶] In addition, $400,000 will be paid to [Larry] within 30 days and within 30 days the Edna Property[3] will be conveyed to [Larry] free of liens and encumbrances with title insurance and taxes prorated. [¶] [Patrick] will warrant that tax returns information provided to Larry by [Patrick's accountant] in 1996 is accurate and will cooperate and make available information that supports that tax return information. [¶] The parties [including Larry, Patrick, their wives, and their children] will exchange mutual general releases of known and unknown claims . . . . [¶] . . . There will be dismissals with prejudice of this litigation with the court retaining jurisdiction pursuant to [Code of Civil Procedure] section 664.6 to enforce the provisions. [¶] The facts of the settlement and the terms of the settlement will be confidential subject only to being provided to accountants for the purposes of tax returns. Attorneys fees will be awarded to prevailing party in the event of a breach. [¶] [Larry] will execute the documents necessary to confirm [100] percent ownership of the properties in Patrick's name and Patrick will hold Larry harmless on all liabilities related to those properties. [¶] [Pine Tree] stock will be quit claimed—whatever interest Larry has in [Pine Tree] stock will be quit claimed to Patrick or however Patrick chooses to have it quit claimed. [¶] The parties will execute such other documents as necessary to accomplish the objectives of the agreement. Larry will release all or withdraw all lis pendens that have been filed or recorded in connection with this litigation. [¶] The parties will enter into a long-term agreement which will contain the details of this agreement as well as such standard provision[s] as are customary in a transaction such as this. [¶] Parties will bear their own attorneys fees and costs. The parties will warranty that there's been no assignment of claims that any of the releasing parties have ever had against the released parties. And Larry . . . will hold harmless the defendants against any

[3] The Edna Property was alleged in Larry's complaint to be one of the properties Patrick acquired with joint venture funds.

claims based on any liens [Larry's prior lawyers] may have in settlement proceeds. And I think that's it."

After Larry's counsel finished putting the settlement terms on the record, the court inquired, "Is there anything specific on La Paz . . . ?" Larry's counsel replied, "Dismissal with prejudice; that's all." The court asked each attorney if the recitation comported with their understanding of the settlement; all said it did. The court then had the attorneys question each of their clients regarding the settlement agreement. Larry's counsel specifically confirmed with Larry on the record he heard the terms of the settlement his attorney had stated on the record, he understood the terms, he agreed to the terms, and he had no questions about the agreement.

The court next clarified a point regarding the agreement to cooperate with long-term capital gains characterization, observing "[i]t's a cooperation clause. And if the [Internal Revenue Service] takes a different position, everybody has agreed to . . . ." Counsel stated they agreed with the court's assessment. The court specifically asked Larry, "Do you understand that?" Larry said he did and he agreed.

The court then commented, "In other words, if all this gets done – we're on the record. What's on the record is binding. Haven't had a chance to do a detailed written agreement, but what's on the record is binding. [¶] So if it all goes, I mean that ends the matter; it's a total resolution. Nobody can come back for any more. It's a done deal. [¶] Everybody understand that? Pat[rick] and Janis answered yes. And [Larry]?" Larry again replied, "yes."

The court asked a few more questions about the confidentiality provision and indicated it would set an order to show cause (OSC) hearing "in a month or so to ensure that everything does get done. [¶] Are there going to be dismissals with prejudice filed at the end of that month or what?" Larry's counsel stated he anticipated there would be, and the court asked how it would supervise the settlement once the dismissals were filed. Larry's counsel replied the court was to retain jurisdiction under section 664.6, and

if problems arose, the settlement would be enforced by noticed motion under that section. The hearing concluded with the court setting an OSC regarding dismissal for December 3, 2007.

Motion to Enforce Settlement

On February 29, 2008, Pine Tree and Patrick and his family filed a motion to enforce the settlement agreement.[4] In his declaration, Pine Tree's attorney explained that in the process of negotiating a final written settlement agreement, Larry attempted to add new terms. He wanted the Edna Property sold and the proceeds given to him (instead of the property being transferred to him), but he later backed away from that request. Larry asked for a clause prohibiting each party from going near the other's properties. And Larry wanted an acceleration clause as to the $2.4 million payment in the event there was a default on the monthly $10,000 payments.

Larry opposed the motion on the grounds the oral agreement was not binding because it contained terms that were too indefinite to be fairly enforced. Specifically, Larry asserted the agreement required the $2.4 million obligation to be fully secured, but the form of security had not been specified. Additionally, the oral agreement did not provide Larry with a default remedy (e.g., acceleration of the debt).

At a hearing on March 24, 2008, the court noted in reference to settlement, "There was one problem. Have you been able to work it out?" Counsel replied they had not. The court stated, "Okay. Then I'm not getting into a mini trial that is going to take a day or two over the settlement agreement. I thought it was pretty definitive when we put

[4] La Paz was not a party to the motion to enforce the settlement agreement but joins in Pine Tree's argument concerning its enforcement. Furthermore, La Paz states that if the global settlement agreement is enforced, its appeal will become moot. Because we remand the matter for the trial court to conduct a hearing and rule upon the motion to enforce the settlement agreement, we do not address La Paz's contention the trial court's judgment against it on its cross-complaint is not supported by substantial evidence.

it on the record. But if there is an issue here, I'm not going to waste my time with a mini trial. We're going to do the closing arguments on the case. . . ."

Pine Tree's counsel argued there was no need for a mini trial—all the court had to do was enforce the agreement as the terms had been clearly identified and agreed upon. The court replied, "If there is any ambiguity then a mini trial is going to be necessary. So, frankly, from my perspective, it is just as easy to have you do your closing arguments and I'll decide the case." Subsequently, the court commented, "I know counsel worked very hard on [settlement], but in light of the family history here, I'm just not going to waste my time arguing over the settlement agreement. We will finish the trial, and I will make my decision." And later at a hearing regarding the form of the judgments, the court also commented, "If the Court of Appeal says you have a binding settlement, believe me, it's not going to hurt my feelings."

Ruling

Counsel presented closing arguments, and the trial court issued an oral statement of decision. On July 22, 2008, the court entered three judgments. The first judgment (the La Paz judgment) was in favor of La Paz on Larry's complaint and in favor of Larry and Patrick on La Paz's cross-complaint.

The second judgment (the Pine Tree judgment), was in favor of Pine Tree on the first cause of action of Larry's complaint. The court ruled Larry was the owner of 37.5 percent of corporate stock and was not entitled to dissolution of Pine Tree. As to Larry's second cause of action for an accounting of Pine Tree, the court ordered Pine Tree to provide Larry with the accounting report required by Corporations Code section 1501 [i.e., an annual shareholders report] within 60 days. The Pine Tree judgment stated Patrick would be required to provide an accounting to Larry in accordance with a separate interim judgment.

The third judgment (titled "interim judgment") was in favor of Larry on his complaint's other accounting causes of action. The court ordered all joint ventures

between Larry and Patrick dissolved, ordered an accounting, and reserved judgment on other causes of action pending completion of the accounting. As to the La Paz-owned Comfort Inn, the court ruled Patrick was "entitled to contribution from [Larry] re[garding] the Comfort Inn operating account to the extent Patrick . . . shows actual payment of the amounts owed through 1996."

DISCUSSION

1. Motion to Dismiss Appeals

Larry has filed a motion to dismiss Pine Tree's and La Paz's appeals. He argues there is as yet no final judgment from which to appeal due to the outstanding accounting. He provides no legal analysis and cites to no authorities in support of his motion. He simply refers us to the interim judgment ordering Patrick to provide an accounting to Larry. But there were three judgments issued. An interim judgment as to Patrick and his family ordering the accounting, and final judgments as to the corporate entities Pine Tree and La Paz. The latter judgments are the subject of this appeal.

The La Paz judgment is appealable because it finally resolves all of Larry's claims against La Paz on the complaint and all of La Paz's claims against Larry on its cross-complaint. (See *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 741 ["Judgments that leave nothing to be decided between one or more parties and their adversaries, or that can be amended to encompass all controverted issues, have the finality required by section 904.1, subdivision (a)."].)

The Pine Tree judgment was in favor of Pine Tree on the first cause of action of Larry's complaint. The court ruled Larry was owner of 37.5 percent of Pine Tree stock and was not entitled to dissolution of the corporation. As to Larry's second cause of action for accounting of Pine Tree, the court ordered Pine Tree to provide Larry with the report required by Corporations Code section 1501 [i.e., the annual shareholders report] within 60 days. The Pine Tree judgment stated Patrick would be required to provide an accounting to Larry in accordance with a separate interim

judgment. The judgment as to Pine Tree finally resolves all claims between Pine Tree and Larry and is appealable.

2. Enforcement of Settlement Agreement

Pine Tree contends the trial court erred by not enforcing the October 23, 2007, settlement agreement.[5] We conclude the trial court erred when it refused to hear and rule on the motion and the matter must be remanded for further proceedings.

"It is, of course, the strong public policy of this state to encourage the voluntary settlement of litigation. [Citations.] To that end . . . section 664.6 [provides] an expedited procedure for enforcing a settlement once it has been agreed upon. [Citation.]" (*Osumi v. Sutton* (2007) 151 Cal.App.4th 1355, 1359-1360 (*Osumi*).) Section 664.6 provides in pertinent part: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. . . ."

"Section 664.6 permits the trial court judge to enter judgment on a settlement agreement without the need for a new lawsuit. [Citation.] It is for the trial court to determine in the first instance whether the parties have entered into an enforceable settlement. [Citation.] In making that determination, 'the trial court acts as the trier of fact, determining whether the parties entered into a valid and binding settlement. [Citation.] Trial judges may consider oral testimony or may determine the motion upon declarations alone. [Citation.] When the same judge hears the settlement and the motion to enter judgment on the settlement, he or she may consult his [or her] memory. [Citation.]' [Citation.] The trial court's factual findings on a motion to enforce a settlement pursuant to section 664.6 'are subject to limited appellate review and will not

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[5] An order denying a section 664.6 motion to enforce settlement is generally reviewed on appeal from a subsequent final judgment. (See *Doran v. Magan* (1999) 76 Cal.App.4th 1287.)

be disturbed if supported by substantial evidence.' [Citation.]" (*Osumi, supra,* 151 Cal.App.4th at p. 1360.)

Section 664.6 imbues the trial court with discretion to enter a judgment enforcing the terms of a settlement agreement, but in this case the court refused to hear or rule upon the motion. A failure to exercise discretion when called upon to do so is an abuse of discretion. (*Kim v. Euromotors West/The Auto Gallery* (2007) 149 Cal.App.4th 170, 176; *People v. Orabuena* (2004) 116 Cal.App.4th 84, 99.) "A court ruling on a motion under . . . section 664.6 must determine whether the parties entered into a valid and binding settlement. [Citations.]" (*Hines v. Lukes* (2008) 167 Cal.App.4th 1174, 1182.)

Although the trial court specifically stated its impression was the parties *had* entered into a binding settlement agreement, it simply declined to consider the motion based on misplaced notions of judicial economy. The evidentiary portion of the trial had just been completed prior to the settlement being reached and placed on the record on October 23, 2007. Over four months passed before the motion to enforce the settlement agreement was filed on February 29, 2008 (five months by the time the motion was heard on March 24). But the court concluded it was easier to simply decide the case, rather than to delve into the issue of the enforceability of the settlement, commenting "frankly, from my perspective, it is just as easy to have you do your closing arguments and I'll decide the case." Subsequently, the court commented, "[I]n light of the family history here, I'm just not going to waste my time arguing over the settlement agreement. We will finish the trial, and I will make my decision." As already noted, there is a strong public policy favoring voluntary settlement of litigation. (*Osumi, supra,* 151 Cal.App.4th at p. 1359.) In view of that policy, we conclude the trial court abused its discretion by refusing to hear and rule upon the motion to enforce the settlement agreement.

On appeal, Larry contends the oral settlement agreement was unenforceable because material terms are too vague or were left open to future negotiation of a written agreement. He does not identify what those specific terms are, but in his opposition below, Larry referred to the following: (1) the agreement to cooperate on tax consequences of payments; (2) default remedies for nonpayment of the $2.4 million obligation, i.e., an acceleration clause in the event of nonpayment; and (3) form of security for the $2.4 million obligation.

But under section 664.6, it was for the trial court to determine in the first instance whether any of Larry's claims were meritorious. We may decide as a matter of law if the statutory elements for an enforceable settlement are present (see *Conservatorship of McElroy* (2002) 104 Cal.App.4th 536, 544 [whether statutory requirements for enforcing settlement agreement were met is question of law]), but it is for the trial court to make the factual findings upon which the question of law may ultimately turn. (See *Osumi, supra,* 151 Cal.App.4th at p. 1360 ["It is for the trial court to determine in the first instance whether the parties have entered into an enforceable settlement. [Citation.] In making that determination, 'the trial court acts as the trier of fact, determining whether the parties entered into a valid and binding settlement. [Citation.]'".) We note the trial court stated it believed the oral settlement agreement was "pretty definitive," but it did not want to "waste [its] time" deciding the factual issues, i.e., whether the parties had entered into an enforceable settlement agreement. Unfortunately, the trial court's haste has made for much waste. We must now return the matter to the trial court for it to perform its duties pursuant to section 664.6. Accordingly, we reverse the judgments and remand with directions that the trial court conduct a hearing on the motion to enforce the settlement agreement placed on the record by the parties on October 23, 2007.

DISPOSITION

The judgments are reversed. The matter is remanded to the Superior Court with directions to hold further proceedings consistent with this opinion. The Appellants are awarded their costs on appeal.

O'LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.